IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellant v. Solomon R. FLORES, Culinary Specialist Chief, United States Coast Guard, Appellee	13 May 2020 REPLY BRIEF ON BEHALF OF THE UNITED STATES Docket No. 001-62-20 Before McClelland, Brubaker, Bruce Tried in Alameda, CA by a General Court-Martial convened by Commander, Pacific Area, 24 February through 4 March 2020.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this reply to Appellee's answer in accordance with Rule 20 of this Honorable Court's Rules of Practice and Procedure.

I. THIS HONORABLE COURT HAS JURISDICTION TO HEAR GOVERNMENT APPEALS UNDER ARTICLE 62, UCMJ, OF A MILITARY JUDGE'S RULING GRANTING A MOTION FOR A MISTRIAL.

A Court of Criminal Appeals has jurisdiction to hear an appeal by the United States of a mistrial ruling under Article 62, Uniform Code of Military Justice (UCMJ) because, consistent with the text of Article 62, a mistrial ruling terminates the proceedings "before the particular court-martial." *United States v. Dossey*, 66 M.J. 619, 624 (N.M. Ct. Crim. App. 2008). No military appellate court has ever held it did not have jurisdiction to hear a Government appeal of a mistrial under Article 62, UCMJ. Appellee attempts to add a new requirement into Article 62(a)(1)(A), UCMJ, whereby "terminat[ion] of the proceedings"

impliedly requires the Convening Authority be prevented from re-referring the charges to another court-martial. Appellee Br. at 11. But that argument does not follow from the text of the statute, and is without merit. This Honorable Court, which has a duty to establish jurisdiction in each cases it hears, took no issue with its jurisdiction in *United States v Sullivan*, Dkt. No. 001-62-17 (C.G. Ct. Crim. App. 29 November 2016) (unpub. op.). *See also United States v. Labella*, 75 M.J. 52, 54 (C.A.A.F. 2015). This Honorable Court has jurisdiction to hear this appeal.

II. APPELLEE'S RELIANCE ON THE MILITARY JUDGE'S SUGGESTION TO WAIT UNTIL AFTER FINDINGS TO MOVE FOR A MISTRIAL IS IMMATERIAL TO WHETHER HE WAIVED HIS OPPORTUNITY TO MOVE FOR A MISTRIAL AFTER HE ASKED FOR AND RECEIVED A CURATIVE INSTRUCTION BEFORE FINDINGS.

Appellee waived his opportunity to move for a mistrial after findings when he specifically declined to move for a mistrial before findings when he was asked by the Military Judge. While this Honorable Court has recognized an accused may move for a mistrial after findings, no appellate court has sanctioned that a party may move for a mistrial after expressly declining to do so after a direct invitation by a court. Both federal and military courts provide support for the position that after an error, a party has a choice to move on to findings, or move for a mistrial. This Honorable Court should vacate the Military Judge's ruling granting a mistrial.

First, the United States did not, as Appellee asserts, and does not argue here that a party may never move for a mistrial after findings. Appellee Br. at 12. No federal or military case cited in the United States' opening brief stands for that proposition. Indeed, in the same case this Honorable Court found it had jurisdiction to hear a Government appeal under Article 62, UCMJ, of a mistrial ruling, it took no issue with an accused moving for a mistrial after findings. *See*

United States v Sullivan, Dkt. No. 001-62-17 (C.G. Ct. Crim. App. 29 November 2016) (unpub. op.).

Second, while an accused may move for a mistrial after findings, Appellee fails to rebut the conclusion he waived his right to move after findings by expressly declining to move for a mistrial before findings and instead asking for a specifically tailored curative instruction. Appellee primarily argues he did not waive his right to move for a mistrial because he relied on the Military Judge's interpretation of *United States v. Short*, 77 M.J. 148 (C.A.A.F. 2018) when he waited until after findings. Appellee Br. at 16. In this context, *Short* merely stands for the general proposition that when an appellate court analyzes prejudice it may consider mixed findings to determine whether the members followed the Military Judge's instructions. *Short*, 77 M.J. at 151. In *Short*, the CAAF did not analyze waiver, and the issue was never raised. *See generally id.* And no case cited by Appellee shows, after a direct inquiry and invitation, pursuant to Rule for Court-Martial (RCM) 915(b), an accused may decline to move for a mistrial, instead ask for, and receive, a curative instruction, and then -- only after the members convict -- move for a mistrial. Appellee did exactly that here. *See* R. at 1396-1409. In fact, Appellee appears to argue that this Honorable Court sanction a rule that allows an accused to make the tactical choice to request a curative instruction before findings and when the court-martial returns findings of guilt, without any additional evidence short of the conviction itself, then move for a mistrial.[1]

Supreme Court and CAAF precedent show it is immaterial, for waiver purposes, that the Military Judge suggested Appellee wait until after findings to move for a mistrial. As the

[1] While usually applied to raising an objection on appeal, if allowed this practice would be the exemplification of "sandbagging," which is "remaining silent about [an] objection and belatedly raising the error only if the case does not conclude in [the accused's] favor." *Puckett v. United States*, 556 U.S. 129, 134 (2009). The principle applies equally to waiting to request a remedy at trial as it does to an appeal.

Appellee acknowledges, the Military Judge does not control Appellee's litigation tactics. Appellee Br. at 17. With regard to a mistrial, it is the accused who "retain[s] primary control over the course to be followed in the event of such error." *United States v. Dinitz*, 424 U.S. 600, 608-9 (1976); *see United States v. Harris*, 51 M.J. 191 (C.A.A.F. 1999) (finding the accused's defendant's desires are the most important factor to consider when deciding whether to grant a mistrial). After an inquiry by the Military Judge, Appellee chose to request for an instruction instead of moving for a mistrial, and in that way retained primary control of the response to the members having considered the unadmitted exhibits. R. at 1396-7. In *Dinitz*, the Supreme Court impliedly makes clear an accused has two choices in response to an error, he may move on to findings despite the error or ask for a mistrial, but may not do both.

> Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal.' Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a sua sponte judicial declaration of mistrial.

Dinitz, 424, U.S. at 608 (quoting *United States v. Jorn*, 400 U.S. 470, 484 (1971)).

Appellee asserts the federal and military cases cited in the United States' opening brief are inapplicable because they would unreasonably limit the Military Judge's discretion, or because the defendants or accused in those cases never moved for a mistrial. Appellee Br. at 13-6. Appellee is mistaken and misapprehends the United States argument. The federal cases are not cited to argue limits to a Military Judge's discretion, but to inform a party when to bring a mistrial motion.[2] *See United States v. Martinez*, 455 F.3d 1127, 1129-30 (10th Cir. 2006);

[2] Other than to argue they are non-binding, Appellee does not try to distinguish the other federal cases cited in the United States' opening brief. *See United States v. Alverez-Moreno*, 657 F.3d 896, 900 (9th Cir. 2011); *United States v. Carter*, 45 Fed.Appx. 339, 347-8 (6th Cir. 2002); *United States v. Omoruyi*, 46 F.3d 1148 (9th Cir. 1995); *United States v. Huang*, 960 F.2d 1128, 1135 (2nd Cir. 1992).

United States v. Ortiz-Arrigoitia, 996 F.2d 436, 442 (1st Cir. 1993); *United States v. Michaud*, 860 F.2d 495, 500 (1st Cir. 1988). Regardless of when a party may bring a mistrial motion, RCM 915(a)-(b) provides the Military Judge with discretion to *sua sponte* declare a mistrial.[3] While Appellee claims *United States v. Stirewalt*, *United States v. Jones*, and *United States v. Lane* are inapplicable because the "Defense never moved for a mistrial," like those cases, Appellee did not move for a mistrial when the error arose in this case. Appellee Br. at 16; R. at 1396. Just like the accused members in *Stirewalt*, *Jones*, and *Lane*, here Appellee only asked for a mistrial after declining to do so earlier in his case. R. at 1396-1416; *United States v. Stirewalt*, 53 M.J. 582, 591 (C.G. Ct. Crim. App. 2000) (abrogated on other grounds by *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004)); *United States v. Jones*, 2009 WL 3467495, at *4 (N.M. Ct. Crim. App. 2009) (unpub. op.); *United States v. Lane*, 624 F.2nd 1336, 1338-40 (5th Cir. 1980).

Here, Appellee evaluated his presentation of the case before findings and chose to request a specifically tailored instruction instead of moving for a mistrial before findings. R. at 1396. Appellee claims CDC did not believe an instruction would cure the error, but that assertion is belied by her actions when she asked for a curative instruction and did not then move for a mistrial before findings. Appellee Br. at 16-7; R. at 1396-1409. In doing so, Appellee accepted the risk the members could return with a guilty verdict to some or all charges. The Military Judge did not, as Appellee suggests, *sua sponte* grant a mistrial. After the members returned with findings, Appellee moved for a mistrial, the Military Judge heard argument and then stated, "[t]he defense motion for a mistrial as to Charge I, Specification 1; Charge II, and the sole Specification thereunder; and Charge III~ sole specification thereunder is granted." R. at 1425.

[3] On appellate review, a decision to grant a mistrial is reviewed under an abuse of discretion standard, which, despite Appellee's assertion, provides that all legal conclusions are reviewed *de novo*. *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017).

Further, the RCM precluded the Military Judge from delaying his decision to grant a mistrial, rendering Appellee's argument superfluous. RCM 915(b) states, "when it otherwise appears that grounds for a mistrial may exist, the military judge shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question." The phrase "when it otherwise appears that grounds for a mistrial may exist" is an adverbial clause which modifies the verbs "inquire" and "decide" by providing that at the time the grounds for a mistrial exists the Military Judge must then inquire into the parties views and decide the issue. By appearing to reserve his ruling until after findings and not making a timely and final ruling the Military Judge misapplied RCM 915(b). This negates Appellee's argument that the he did not waive his opportunity to request a mistrial when the Military Judge *sua sponte* asked the parties to argue the mistrial issue after findings.

The United States is not asserting Appellee waived for appellate purposes the underlying error that the members viewed impermissible evidence. That error, if asserted on appeal, would still be preserved and would require this Honorable Court to make a prejudice analysis under Article 59(a), UMCJ, as to the prejudicial nature of the impermissible evidence. This Honorable Court, if it were to vacate the Military Judge's ruling, would have jurisdiction to review this case regardless of the sentence Appellee receives. *See* Article 66(b)(1)(B) (appellate jurisdiction over all cases in which the "Government previously filed an appeal under [Article 62, UCMJ]"). But Appellee's decision to request a curative instruction instead of timely moving for a mistrial before findings waived his opportunity to move for a mistrial after findings. This case is about waiver of remedy, the mistrial, not as Appellee seems to suggest, waiver of the conceded error, that the members viewed the unadmitted exhibits.

III. APPELLEE FAILS TO SHOW ANY EVIDENCE IN THE RECORD OF TRIAL WHICH REBUTS THE CONCLUSION THE MILITARY JUDGE ABUSED HIS DISCRETION.

Appellee identifies no evidence in the Record of Trial that supports the Military Judge's conclusion the members did not follow his instructions, or that shows prejudice that reached the level of manifest injustice. Appellee merely restates the Military Judge's unsupported conclusion. Any conclusion must be supported by the record. *See Pugh*, 77 M.J. at 3. Nor does Appellee show how the unadmitted evidence rose to the level of *manifest* injustice articulated in RCM 915(a). Since the Military Judge's conclusions are not supported by the record, and Appellee did not suffer sufficient prejudice to make it manifestly necessary to declare a mistrial, this Honorable Court should vacate the Military Judge's ruling.

The Military Judge abused his discretion in two distinct ways. First, the Military Judge's conclusion that the members did not follow his instructions to disregard the unadmitted exhibits is unsupported by the record. Appellee identifies no evidence in the record that rebuts the legal presumption that the members followed the Military Judge's instructions. *See United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (citing *Tennessee v. Street*, 471 U.S. 409, 415 (1985)). The only argument by Appellee to rebut the presumption is that the Military Judge relied on *Short* when he allowed the members to proceed to findings because "any guilty finding would indicate to him that the curative instructions were ineffective." Appellee Br. at 27. But the verdict is not evidence. This logic would vitiate the presumption that members follow instructions. *See Bruno v. United States*, 308 U.S. 287, 294 (stating that Court has "not yet attained that certitude about the human mind which would justify [the Court] in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instruction of the trial court"). Under this theory, after any trial -- in which an error occurred -- ending in a guilty verdict, an accused, without

anything more, would be entitled to a mistrial solely because he was convicted. Regardless, "[a]bsent evidence to the contrary, a jury is presumed to have complied with the judge's instructions[,]" and Appellee does not point to anywhere in the record that shows evidence the members did not follow the Military Judge's second instruction. *United States v. Carter*, __ M.J. __ (C.A.A.F. 29 Apr. 2020); *See United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F. 1994). This legal presumption necessarily carries with it the judicial recognition that the curative instructions cured the error and prejudice in this case.

Second, assuming the curative instructions did not purge the prejudice, the Military Judge incorrectly concluded that when the members viewed the unadmitted exhibits it cast such "substantial doubt upon the fairness of the proceedings" that it was "manifestly necessary in the interest of justice" to declare a mistrial. RCM 915(a). Appellee does not cite any relevant evidence from the record to support the Military Judge's conclusion there was sufficient prejudice to grant a mistrial. The only alleged evidence of prejudice Appellee cites is his severance motion to show what witnesses he would have requested to rebut FN A.J.'s allegation. Appellee Br. at 28-9. Yet that evidence just highlights the lack of prejudice the unadmitted exhibits caused to Appellee. In his severance motion and brief here, Appellee stated additional witnesses would be needed to defend against FN A.J.'s sexual assault allegation. *See* Appellee Br. at 27-8; App. Ex. XVIII at 4-5. But the unadmitted exhibits do not reveal that FN A.J. made a sexual assault allegation. *See* Pros. Ex. 8, 9 for ID. Appellee states the witnesses he would have called were to attack FN A.J.'s character. *See* App. Ex. XVIII at 4-5. Yet the unadmitted exhibits do not reveal her identity. Pros. Ex. 8, 9 for ID. And since the Military Judge ruled the United States could not present the substance of FN A.J.'s allegation, character witnesses would have provided irrelevant and inadmissible testimony regardless of what the members viewed in the unadmitted exhibits. App. Ex. 47, at 4-6.

Other than citing to his severance motion, Appellee largely restates the Military Judge's unsupported conclusion of prejudice without pointing to any applicable evidence in the record which supports that conclusion. *See* Appellee Br. at 23-28. Whether Appellee suffered prejudice sufficient to warrant a mistrial is a conclusion of law. *See* RCM 915(b) discussion. This Honorable Court gives no deference to the Military Judge's conclusions of law as it reviews those conclusions *de novo*. *United States v. Wuterich*, 68 M.J. 511, 515 (N.M. Ct. Crim. App. 2009); *United States v. Burney*, 66 M.J. 701, 702 (A.F. Ct. Crim. App. 2008). Since Appellee does not identify any actual prejudice, and none can be found in the record, the Military Judge's conclusion there was sufficient prejudice to grant a mistrial is an abuse of discretion.

Finally, Appellee cites *United States v. Dossey*, 66 M.J. 619, 625 (N.M. Ct. Crim. App. 2008) to argue the Military Judge did not abuse his discretion. But *Dossey* supports the United States' position. In *Dossey*, the NMCCA articulated what procedural steps a Military Judge must take before declaring a mistrial. *Id*. at 625. In restating the RCM and case law, the NMCCA made a clear when considering whether to grant a mistrial a Military Judge must inquire into the fact, request the views of the parties, and consider on the record if less drastic remedies are adequate to remedy an error. *Id* (citations omitted). That is exactly what occurred here, and in response to the Military Judge's inquiry Appellee requested an instruction instead of a mistrial. R. at 1389-1397. Regardless of *Dossey*, the question in this case is not whether the proper procedural steps were taken, it is whether there was evidence in the record to support the Military Judge's findings and his conclusion that the prejudice was so high to trigger the manifest necessity requirement to declare a mistrial. Since there is insufficient evidence of prejudice, the Military Judge abused his discretion and this Honorable Court should vacate his decision.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that this Honorable Court vacate the Military Judge's ruling granting a mistrial.

Respectfully submitted,

Date: 13 May 2020

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered to the Court, opposing counsel, and special victim's counsel on 13 May 2020.

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